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Supreme Court, U.S.
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No. 08-

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IN THE

Supreme Court of the United States

AMY ROBERTSON, individually and as Guardian Ad Litem for RYDER ROBERTSON (6/16/2003); CURTIS ROBERTSON, individually and as Guardian Ad Litem for RYDER ROBERTSON (6/16/2003);

Petitioners,

v.

COUNTY OF VENTURA, a political entity; JODY KELLER, an individual; SGT. WAREHAM, an individual; SCOTT PETERSON, an individual; DONNA KUENEN, an individual; THERESA MAYERNIK, an individual; HAROLD AMER, M.D., an individual; NEIL KAUFMAN, M.D., an individual; KENNETH WRIGHT, M.D., an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does California Penal Code § 11172, a state statute granting immunity to mandated reporters, apply in a federal 42 U.S.C. § 1983 action?

2. Are private healthcare providers state actors for the purposes of 42 U.S.C. § 1983 when they serve a public function, act jointly with government officers, under governmental compulsion or coercion and the government is the nexus of the conduct?

3. Are public officials [Respondents Keller, Kuonen, Wareham, Mayernik and Peterson] entitled to the qualified immunity for conduct and functions which were not related to the initiation and filing of a petition to remove a minor from custody of his/her parents [*California Welfare & Institutions Code* § 300] and when they file false affidavits, coerce private individual to present false affidavits and do not have probable cause to remove a child from the custody of his parents?

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Petitioners Amy Robertson, individually and as Guardian Ad Litem for Ryder Robertson (6/16/2003) and Curtis Robertson, individually and as Guardian Ad Litem for Ryder Robertson (6/16/2003), respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith, at A. The orders of the District Court in this case is reproduced at B and C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 8 U.S.C. § 1254(1). The Court of Appeals entered its judgment on April 22, 2008.

STATUTES AND RULES INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 are set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The pertinent provisions of 42 U.S.C. § 5106a (b)(2)(A)(vii) (hereafter "§ 5106a") are set forth below:

> (A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes — (vii) provisions for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect."

The pertinent provisions of California Penal Code § 11164 (hereafter "§ 11164") concerning the duty to report child abuse are set forth below:

> "[A] mandated reporter shall make a report to an agency . . . whenever the mandated reporter, in his or her professional capacity

> or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect . . . For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect."

The pertinent provisions of California Penal Code § 11172 (hereafter "§ 11172") concerning the immunity of a mandated reporter are set forth below:

> "(a) No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment. Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect

known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused. No person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse or neglect, or causing photographs to be taken of a suspected victim of child abuse or neglect, without parental consent, or for disseminating the photographs with the reports required by this article. However, this section shall not be construed to grant immunity from this liability with respect to any other use of the photographs."

STATEMENT OF THE CASE

On February 24, 2004, Ryder Robertson was admitted to the local hospital with very severe symptoms of lethargy, irritability and vomiting. The hospital personnel found that Ryder was suffering from dehydration and was so weak that his legs could not support him nor could he sit up. While examining Ryder, a nurse noticed a tense, large bulge located at the anterior fontanel, which is one of the two "soft spots" on an infant's head. After further examination and a CT scan, it was discovered that Ryder was suffering from bilateral acute and subacute subdural hematomas or hygromas. The personnel at the hospital immediately arranged for a transfer to Cedars Sinai Hospital in Los Angeles. After examining Ryder, the surgeon recommended that Ryder undergo intracranial surgery immediately. A very successful surgery was performed

on February 25, 2004. Post-surgery, on February 25, 2004, a report was generated internally by the staff at Cedars-Sinai Hospital that found the family had no problems which might impact discharge plans and noted that there was no suspected abuse or neglect and the child was not subject to any risk factors.

In spite of the Cedars-Sinai report, on February 25, 2004, Jennifer Minkoff, the social worker at Cedars-Sinai, filed a report of suspected child abuse with the Ventura County Human Services Agency, pursuant to California Penal Code § 11164 *et seq*. As a result of the Minkoff report, on February 26, 2004, Respondents Kuonen and Mayernik made a decision that Ryder needed altered parenting because of the risk of injury. Respondents Keller, Kuenen and Mayernik came to the erroneous conclusion that Ryder had an altered brain function. There was never any evidence at any time that Ryder ever had an altered brain function. During the same period, Respondents Keller, Kuonen and Mayernik, without knowing or investigating any of the circumstances of Ryder's birth and/or what may have caused Ryder's condition and without any evidence to support their theory, decided that Ryder must have been a victim of Shaken Baby Syndrome (hereinafter "SDS.")

On February 26, 2004, Respondents Kuonen, Keller and Mayernik began soliciting "a letter of detriment regarding this non-accidental trauma" from Respondents Amer and Kaufman. Respondents Amer and Kaufman rejected this solicitation. From February 28, 2004 until March 3, 2008, Respondent Kuonen, Keller and Mayernik continued to solicit "a letter of detriment regarding this non-accidental trauma" from Respondent

Amer and Kaufman. Neither Respondent Amer or Kaufman would agree to prepare the letter of detriment stating Ryder was a victim of SDS.

Respondent Keller acknowledged to Petitioners that absent a letter of detriment she did not have probable cause to arrest Petitioners for Shaken Baby Syndrome nor did she have any evidence to support placing a hold on Ryder.

Suddenly without consulting Ryder's prior health care-providers and without reviewing Ryder's previous medical records, on March 3, 2004, Respondent Amer wrote a letter of detriment to Ventura County Human Services Agency. Respondent Amer carefully worded his statement and qualified his statement to the extent that Ryder's condition was merely consistent with infantile shaking; the letter did not state categorically that Ryder was a victim of SDS. Respondent Amer's letter shows his lack of proper medical probing in the possible causes of Ryder's condition.

Without consulting Ryder's prior health care-providers and not reviewing any of Ryder's previous medical records, on March 15, 2004, Respondent Kaufman wrote a letter to Ventura County Human Services Agency stating that Ryder's condition was compatible with "SDS." However as did Respondent Amer, Respondent Kaufman carefully crafted his statement; Kaufman never states that he personally concluded that Ryder was a victim of SDS; Kaufman further distanced himself from any conclusion that Ryder was a victim of SDS by stating: "[H]owever, the

possibility of very minor trauma causing the bleeding in the context of an existing subacute subdural hematoma is also a reasonable explanation."

On March 4, 2004, Respondents Kuonen and Mayernik submitted a false report entitled "Individualized Health Care Plan" to the Ventura County Human Services Agency. In this false report, Respondent Kuonen falsely stated that "Ryder was a happy thriving baby prior to his injuries which are life threatening. Child has history of reflux." Upon submitting the above mentioned false report but prior to the filing of the *§ 300* Petition, Ryder was placed on a hold placed by Respondent Kuenen. The erroneous report and the false letter of detriment by Respondent Amer were sufficient to place a hold on Ryder. On March 8, 2004, Respondent filed a petition in the Superior Court for Ventura County requesting Ryder be taken from his parents, placed in foster care, but not with his maternal grandparents. On March 10, 2004, the Superior Court of Ventura County issued a § 319 Detention Findings and Orders; Out of Home, ordering Ryder be placed in foster care. On March 11, 2004, Ryder was released from Cedars-Sinai Hospital into the care of a foster parent, Shelly Burns, who had no training in the care of a child in Ryder's post-surgery condition. On March 11, 2004, Respondent Kuonen prepared and executed another false report entitled: "Child's Needs and Services Plan." Respondent Kuonen stated in that report: "Ryder was a happy thriving baby prior to his injuries. Child sleeps through the night." On March 12, 2004, by order of the Superior Court of Ventura County, the out-of-home order was modified so that Ryder was

relocated to his eighty (80) year old maternal grandparents over the objections of Respondents Keller, Mayernik and Kuonen.

After five months of being in the custody of his grandparents, on August 16, 2004, the Superior Court of Ventura County, Judge Charles Campbell presiding, began a trial on the § 300 petition. After a lengthy bench trial, Judge Campbell dismissed the petition and ordered Ryder returned to the custody of his parents. No criminal charges have ever been filed against Amy Robertson or Curtis Robertson or any other person. Subsequent medical examinations and tests have uncovered significant defects due to the trauma of the birth.

On January 18, 2005, Petitioners filed a Complaint and on June 6, 2005, Petitioners filed a Second Amended Complaint, which is the operative pleading in this matter. On June 15, 2005, Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura filed their Answer. On June 21, 2005, Respondents Amer and Kaufman filed a Rule 12(b)(6) Motion to Dismiss. On July 6, 2005, Respondent Wright filed his Answer. On August 26, 2005, after Petitioners' opposition and Respondents' Reply was timely filed, the District Court granted Respondents Amer and Kaufman's Motion to Dismiss On or about September 7, 2005, Respondent Wright filed a Rule 12(c) Motion for Judgment on the Pleadings which was granted on October 4, 2005. On November 28, 2005, Petitioners requested an order certifying an interlocutory appeal on the issue of whether California Penal Code § 11172 applied to Respondents Wright,

Amer and Kaufman under the circumstances of this matter. The District Court denied the request for an Interlocutory Appeal.

On February 24, 2006, Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura filed a Motion for Summary Judgment as did Respondent Mayernik on February 27, 2006. On April 24, 2006, the court granted Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura's Motion for Summary Judgment.[1] After judgment was entered in favor of Respondent Mayernik, a timely Notice of Appeal was filed on May 19, 2006.

After extensive briefing and oral argument by the parties, on April 22, 2008, the Ninth Circuit Court of Appeals issued a Memorandum (unreported). The Court of Appeals' Memorandum was a mere two and a quarter pages which did not address the issues in any detail and did not cite any facts attributable to the law that it erroneously applied. Although Ryder Robertson was taken from his parents and placed in the custody of a

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1. At the hearing on Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura's Motion for Summary Judgment, the District Court declined to issue a statement of findings of fact and conclusions of law. The Court declined to adopt the Statement of Uncontroverted Facts and Conclusions of Law offered by Respondents. The Court entered a judgment based on the rulings it had made during the oral argument at the hearing. In the minute order of April 24, 2006, the Court stated "For the reasons on the records, the Court GRANTS the above motions. Judgments to issue." The sum and substance of the District Court's decision was "Defendants have absolute immunity."

third party for five months without probable cause based on fabricated evidence, based on a fantasy SDS claim and by the unlawful conduct of Respondents Keller, Mayernik, Kuenen, Peterson and Wareham, the Court of Appeals, without any uncontroverted facts to rely upon, decided that Petitioner's constitutional rights were not violated by Respondents. The Court of Appeals never explained why presenting false evidence to a court and removing an infant from his parents without probable cause is not a violation of one's constitutional rights.

Although the District Court acknowledged that Respondents Amer, Kaufman and Wright were state actors for purposes of 42 U.S.C. § 1983, the District Court held that they had immunity pursuant to § 11172. On the other hand, the Court of Appeals, upon review, without citing any uncontroverted facts upon which they relied and contrary to the case law in every case addressing this issue, held that Respondents were not state actors. Because the Court of Appeals held that Respondents Amer, Kaufman and Wright were not state actors, it never addressed the issue on which the District Court dismissed the matter, whether § 11172 applied in a 42 U.S.C. § 1983 case.

REASONS FOR GRANTING THE PETITION

This Court should grant the Writ: (1) In order to resolve issues concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against social service workers and other personnel who claim immunity under state law; 2) Because a district court has so far departed from precedential law and the Court of Appeal sanctioned such a departure by the District Court; and 3) Because a United States District Court and a United States Court of Appeals has decided an important question of law which has not been but, should be settled by the Supreme Court, and has decided a federal question in a way that conflicts with the other applicable decisions of the Supreme Court.

I. A PRIVATE INDIVIDUAL WHO CONSPIRES WITH A STATE SOCIAL SERVICE OFFICIAL IS NOT ENTITLED TO THE ABSOLUTE IMMUNITY PROVIDED BY A STATE STATUTE IN A 42 U.S.C. § 1983 ACTION

Review is warranted to resolve the issue of whether a mandated reporter [who is a private individual] who conspires with a state social service official is or is not entitled to the same immunity that is provided to a public official. Review is also warranted to resolve the issue of whether a mandated reporter [who is a private individual] is or is not entitled to absolute immunity pursuant to a state statute [California Penal Code § 11172] in a 42 U.S.C. § 1983 action.

A. PRIVATE INDIVIDUALS WHO CONSPIRE WITH STATE OFFICIALS ARE NOT ENTITLED TO SAME IMMUNITY AS THE STATE OFFICIAL.

Private persons who conspire with a public official in conjunction with the public official's performance of his official duties, are acting under color of state law for the purpose of § 1983, even if the public official ultimately is immune from civil liability. A private person who acts in concert with a public official to violate the constitutional rights of an individual is not entitled to the immunities offered to the public official. *Wyatt v. Cole*, 504 U.S. 158 (1992) (private persons are not entitled to immunity under § 1983). "Immunity for private defendants was not so firmly rooted in the common law, and was not supported by such strong policy reasons as to create an inference that Congress meant to incorporate it into § 1983." *Id.*

Respondents Amer, Kaufman and Wright, who are alleged to have conspired with Keller, Kuenen and Mayernik in having Ryder Robertson taken from his parents, are not entitled to the same immunities as Keller, Kuenen and Mayernik.[2]

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2. Respondents Amer and Kaufman were dismissed after filing a Rule 12(b)(6) and Rule 12(c) motions. Respondent Wright was dismissed pursuant to a Rule 12(c) for judgment on the pleadings. This was an inappropriate holding in that in both a Rule 12(b)(6) and Rule 12(c) motions, "[A] complaint should not be dismissed unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Id.* In reviewing the dismissal, we must take all (Cont'd)

Public officials are generally granted immunity from claims that allege tortuous conduct which is within the course and scope of their public employment. The state takes on that liability under the state torts claim act which permits suit against the state and abrogates the sovereign immunity of the state. However, state immunity statutes have no application in federal constitutional claim pursuant to § 1983.

Private persons who act in concert with public officials may be become liable in a § 1983 action if certain conditions are met; but much to the consternation of the private individual, the immunities afforded the public officials are not afforded to the private individuals who are found to have become state actors.

Mandated reporters are required by law to report certain conduct to the state officials. Moreover, in a § 1983 action, if the mandated reporter works in concert with and conspires with state officials, they are not afforded the same state and federal immunities granted to public officials.

Petitioners pray the Court grant the Writ of Certiorari to consider the issue of whether mandated reporters, pursuant to § 11164 *et seq.* and other similar state statutes, are entitled to the same immunities afforded state actors in a § 1983 action.

(Cont'd)
allegations of material fact in the Complaint as true and construe them in the light most favorable to the Plaintiffs. Although petitioners' adequately pleaded the conspiracy cause of action and the Fourth and Fourteenth Amendment causes of action, the Court of Appeals determined that these Respondents did not violate the constitutional rights of Petitioners.

B. STATE IMMUNITY STATUTES HAVE NO APPLICATION IN A FEDERAL § 1983 ACTION

In the Rule 12(b)(6) Motion to Dismiss [Amer and Kaufman] and the Rule 12(c) [Wright] Motion for Judgment on the Pleadings, the District Court held that, as a matter of law, a state statutory immunity provision [§ 11172] is applicable in a federal § 1983 action. In particular, the District Court held that in response to 42 U.S.C. § 5106a, the California legislature enacted California Penal Code § 11166 which requires persons who are designated as mandated reporters, to report behavior which they interpret as child abuse. Additionally, the California legislature enacted California Penal Code § 11172 which grants immunity from civil liability to those mandated reporters who make such reports pursuant to § 11166. "[T]he Court rejects Plaintiffs' contention that recognizing and enforcing the Moving Defendants' immunity is inconsistent with the intent of Congress as expressed in the Child Abuse Prevention and Treatment Act ("CAPTA") *see* 42 U.S.C. § 5106a." Contrary to the District Court's holding, Petitioners did not argue that granting immunity to Respondents was inconsistent with the intent of Congress; Congress gave no indication of its intent. Petitioners argued that there is a long standing rule that state immunity statutes are not applicable to federal § 1983 actions and Congress did nothing in § 5106a to abrogate that rule. When enacting § 5106a, Congress was very specific and limited the immunity from suit to state and local laws and regulations.

Congress enacted 42 U.S.C. § 5106a(b)(2)(A)(vii) (hereafter "§ 5106a") which provides: "(A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes — (vii) provisions for immunity from *prosecution under State and local laws and regulations* for individuals making good faith reports of suspected or known instances of child abuse or neglect." (Emphasis added) Congress required the states to enact statutes which immunized mandated reporters from being sued under state and local laws and regulations. There is no mention of immunization from suit under the Constitution or statutes of the United Sates of America. There was no implication that Congress intended to immunize mandated reporters from constitutional claims.

The State of California responded by enacting Penal Code § 11172 which provides in pertinent part: "No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article . . ."

The issue thus becomes: Is § 11172 applicable in a federal § 1983 action which alleges a violation of the Constitution of the United States; *i.e.*, does § 11172 and other states' mandated reporter immunity statutes, protect mandated reporters from suit in a federal court pursuant to § 1983? The law is very clear that it does not. An immunity claim in a § 1983 action raises a

question of federal not state law. As this Court held in *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980):

> "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. (Citation omitted) 'The immunity claim raises a question of federal law.' (Citation omitted) "

State law immunities do not have any application in § 1983 actions. In spite of this long established bright line approach by this Court, the District Court disregarded existing law [*Martinez supra*] and held that § 11172 [a state immunity statute] applied in this case and dismissed the matter with prejudice. The District Court held that it was the intent of Congress to immunize mandated reporters from suit under any circumstances in any court at any time and that policy did not detract from an individual's ability to seek relief in a § 1983 action from a violation of his/her constitutional rights. The District Court attempted to [and unless this Court reserves that decision], has enacted a public policy which is contrary to *Martinez supra* and its progeny.[3] *Martinez*

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3. A number of district courts and state courts have also held that a statute similar to § 11172 grants immunity in § 1983 (Cont'd)

supra has been the law of the land for twenty-eight years and has been cited hundreds of times for the proposition that federal law not state law control the immunity issue in § 1983 actions. Petitioners can find no Federal Court of Appeals cases which holds to the contrary. This Court has had many opportunities to overturn the rule of *Martinez supra* but has not been inclined to do so. Congress has had twenty-eight years to overturn this Court's holding in *Martinez supra* and has not done so.

Unfortunately, the Court of Appeals did not reach this issue and avoided the issue by holding that Respondents Amer, Kaufman and Wright were not state actors. [Petitioners will address this issue below] State action is an essential element in a § 1983 action and absent state action, the § 1983 action must fall. By holding that Respondents, Amer, Kaufman and Wright were not state actors, the Court of Appeals avoided addressing the issue of § 11172 immunities.

Petitioners pray the Court grant the Writ of Certiorari to consider the issue of whether § 11172 and other similar state immunity statutes afford absolute immunity to mandated reporters who violated the constitutional rights of an individual.

(Cont'd)
action *See Thomas v. Chadwick*, 224 Cal.App.3d 813 (1990); other court have refused to do so. *But, see Doe v. Regents of University of California* (E.D.Cal. 2006) No. CIV. S-06-1043 LKK/DAD.

II. A PRIVATE INDIVIDUAL WHO CONSPIRES WITH A STATE SOCIAL SERVICE OFFICIAL TO VIOLATE THE CONSTITUTIONAL RIGHTS OF AN INDIVIDUAL IS A STATE ACTOR IN A 42 U.S.C. § 1983 ACTION.

The issue is whether mandated reporters are state actors when they comply with § 11166 or other state's similar statutes. Although the parties briefed this issue extensively, the District Court did not directly address the issue. There was no reference in any written order and only a passing reference to state action in oral argument. The District Court stated: "I think the conspiracy allegations in the act (sic) or bases (sic) are sufficiently pled to probably warrant denying the motion on that ground. But the immunity issue and particularly the supremacy clause is the one that I think may be dispositive." The District Court then went on to address the issue of immunity pursuant to § 11172. If the District Court had been inclined to find that these Respondents were not state actors, it would not have reached the issue of immunity because the issue of immunity becomes moot if the Respondents are not state actors. Therefore, by stating that conspiracy cause of action was pleaded sufficiently, the District Court apparently reached the conclusion that these Respondents were state actors. The District Court also did not consider the issue of whether the Constitutional rights of Petitioners were violated, or whether there was injury to Petitioners. The District Court correctly construed the allegations in the Complaint as true and proceeded to the issue of immunity.

On the other hand, the Court of Appeals, reviewing the matter de novo, held that Respondents Amer, Kaufman and Wright were not state actors and never addressed the issue of the mandated reporters' § 11172 immunity. The Court of Appeals erroneously relied upon *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999). The *Sutton* court in addressing this issue, followed and restated *Blum v. Yaretsky*, 457 U.S. 991 (1982): ". . . the compulsion factor functions differently in cases 'in which the defendant is a private party.'" *Sutton supra* at 839 "[T]the Court merely applied the well-accepted principle that a private party's joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor." *Id.* at 840

In spite of the fact that the compulsion factor is not required where a private individual is alleged to be a state actor, in the case at bar, it is an important element in that mandated reporters are required [compelled] to comply with § 11166 and report exactly as state law prescribes. Absent compliance with § 11166, mandated reporters may be criminally libel. The state, pursuant to § 11166, requires that mandated reporters report any incident that they believe to be child abuse. This requirement in § 11166 fulfils the compulsion requirement. In addition, *Sutton* and *Blum* require that another factor, either participation, joint action, public function and/or governmental nexus to be present.

While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is

a willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

> "What is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board . . . nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001). Nonetheless, we recognize at least four different criteria, or tests, used to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) citing *Sutton supra* Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists. *Id* at 1092

In the case at bar, all of these factors are present. Respondents were willing joint participants in a joint action with Respondents Keller, Kuenen and Mayernik in a public function which had a governmental nexus. The conspiracy to remove Ryder from the custody of his parents meets the criteria of three of the four above-mentioned prongs of the test and possibly the fourth if Respondents argue that they were not willing participants in the conduct to remove Ryder from his parents custody; they were coerced. However, Respondents did not argue they were unwilling

participants or they wrote the letters of detriment under duress or coercion. Respondents do not argue that there was not joint action or that it was not a public function or there was no governmental nexus.

"[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) In the case at bar, the State of California is responsible to the specific conduct of Respondents, i.e. requiring Respondents to file reports of child abuse.

The determination of whether the specific conduct of which the plaintiff complains constitutes state action is a "necessarily fact-bound inquiry." *Brentwood supra at 298* A challenged activity by a private entity may be deemed state action when the state exercises "coercive power," . . . or provides the private actor with "significant encouragement, either overt or covert," . . . or when the private actor "operates as a willful participant in joint activity with the State or its agents," *Brentwood supra* at 296 The element of significant encouragement, either overt or covert is crucial in the case at bar. If Respondents had not filed a report, Respondents Keller and/or Kuenen could have charged them with a failure to report pursuant to § 11166. Therefore the element of overt encouragement is present.

The Court of Appeals, without comment or discussion, concluded that these Respondents were not state actors. The Court of Appeals erroneously held that "these doctors were not state actors." The Court of Appeals gave no reason for finding that Respondents

were not state actors. The Court of Appeals did not explain or distinguish the factors of coercion, joint action, willing participation and a public function.

Petitioners established without objection that Respondents were coerced by Respondents Keller, Kuenen and Mayernik into reporting this incident, this action was joint with Respondents Keller, Kuenen and Mayernik. Based on the foregoing, Petitioners pray this Court grant a Writ of Certiorari to resolve the issue of whether mandated reporters are state actors when they comply with the state statute and report incidents of child abuse.

IV. A STATE SOCIAL SERVICE OFFICIAL IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR FILING FALSE STATEMENTS AND OMITTING EXCULPATORY EVIDENCE WHEN INVESTIGATING, PREPARING AND FILING PETITIONS TO REMOVE CHILDREN FROM THEIR PARENTS.

A public official who is a party to § 1983 suit is generally entitled only to immunities that existed at common law. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976). The courts have therefore "granted state actors absolute immunity only for those functions that were critical to the judicial process itself," such as "'initiating a prosecution.'" *Miller v. Gammie*, 335 F.3d 889, 896 (9th Cir. 2003) (en banc) (citing *Imbler*, 424 U.S. at 431) It follows that social workers have absolute immunity when they make "discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents." *Id.* at 898. On the

other hand, social service officials are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute. A prosecutor doesn't have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, *see Buckley v. Fitzsimmons*, 509 U.S. 259, 275(1993), or makes false statements in a sworn affidavit in support of an application for an arrest warrant, *see Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997). Furthermore, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting similar investigations have no such immunity. *See Id.* at 126.

In the case at bar, the District Court considered that Respondent Keller, a deputy sheriff, was functioning as a social service worker [the same as Kuenen] while investigating the matter. The District Court also considered Respondent Mayernik, a county nurse, was functioning as a social service worker [the same as Kuenen] while investigating the matter. The District Court analyzed all three of these Respondents by the same standard for purposes of absolute or qualified immunity. The Court of Appeals also analyzed all three respondents by the same standards.

The District Court never engaged a complete analysis for qualified immunity. 1) Was there a constitutional violation? 2) Was the law clearly

established? and 3) Would a reasonably trained public official believed he/she was violating a person's constitutional rights? The District Court never determined whether or not there was a constitutional violation. The District Court never determined whether or not the law was clearly established. The District Court never determined whether or not these Respondents believed they were violating Petitioners' constitutional rights. The District Court held "[A]nd it's on the basis of immunity that I grant the summary judgment as to the defendants, and you will hear why." However, the District court never explained why. The District Court refused to make any findings of fact whatsoever. Once a constitutional violation is established, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct" *Groh v. Ramirez*, 540 U.S. 551, 654 (2004)

On the other hand, the Court of Appeals skipped the first two elements of the qualified immunity test, and immediately determined without ever explaining why, that there was no constitutional violation of which a reasonable person would have known. Petitioners argue that any reasonable person would have known that the preparation of an affidavit with knowingly false statements for the purpose of having a child removed from his parents is a violation of one's Fourteenth Amendment rights. Petitioners argue that any reasonable person would have known that conspiring with doctors in the preparation of false "letters of detriment" for the purpose of having a child removed from his parents is a violation of one's Fourteenth Amendment rights. The Court of Appeals never

explained what those discretionary decisions supposedly made by Respondent, were and when they were made. The Court of Appeals never explained why filing false affidavits did not violate Petitioners' rights. The Court of Appeals never explained why Keller and Kuenen's action of taking Ryder into custody [placing a hold on him while he was still in the hospital and they admitted they did not have probable cause to hold him] was not violating his rights. The Court of Appeals never explained why Keller and Kuenen would not have known that filing false statement in an affidavit was not a violation of Petitioners' rights.

It appears the District Court and the Court of Appeals did not consider the filing of false reports, the solicitation of false letters of detriment and the placing of a hold on Ryder when they knew they did not have probable cause to place the hold are not violations of petitioners' constitutional rights. The law is clearly established that the filing of false reports or the solicitation of false affidavits is a violation of one's constitutional rights when it results in the removal of the infant from his parent's custody.

Based on the foregoing, Petitioners pray this Court grant a Writ of Certiorari to resolve the issue of whether social service workers, law enforcement officers and a county nurse are entitled to qualified immunity when they file false reports, solicit false affidavits and take a child into custody absent probable cause when that conduct results in the removal of the child from his parent's custody.

CONCLUSION

For the foregoing reasons, Petitioners pray the Court grant a Petition for a Writ of Certiorari.

Respectfully submitted,

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